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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 653

GAS RIDGE, INC., Petitioner,

versus

SUBURBAN AGRICULTURAL PROPERTIES, INC., Respondent.

MOTION TO DISMISS PETITION FOR CERTIORARI

and

REPLY TO PETITION FOR CERTIORARI.

KNOX MILLER,
LEO BREWER,
San Antonio 5, Texas,
Attorneys for the Respondent.

LUDOVIC PRINTING CO., SAN ANTONIO, TEXAS

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No. 653

GAS RIDGE, INC., Petitioner,

versus

SUBURBAN AGRICULTURAL PROPERTIES, INC., Respondent.

MOTION TO DISMISS PETITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition for the writ of certiorari should be dismissed because the record filed in this honorable court does not include the original, or a printed or other copy, of a 77 page typewritten volume pre-

pared by the court reporter, entitled by him the "Exhibit Appendix", and comprised of substantially all the documentary evidence received at the trial including the lease itself. A duplicate original, filed copy of this "Exhibit Appendix" is herewith enclosed. The record as filed in this honorable court by petitioner without this "Exhibit Appendix" is incomplete, inadequate, and unintelligible, such that the material thus far filed by petitioner does not constitute the record in the case. The petition for rehearing was overruled by the honorable Circuit Court on September 13, 1945, more than three months now having elapsed since that date.

REPLY TO THE PETITION.

Subject to, and without waiving the foregoing motion to dismiss the petition, respondent replies thereto as follows:

1. **Reply to the First Assignment of Error. W. T. Waggoner Estate v. Sigler Oil Company,**[1] on which petitioner bases its first assignment, was decided by the Supreme Court of Texas June 28, 1929. **Garcia v. King**[2] was decided by the same

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1. 19 S. W. (2d) 27.
2. 164 S. W. (2d) 509.

court July 15, 1942. Petitioner takes the position that the State Supreme Court is in conflict with itself in these two decisions and that the Circuit Court erred in applying the rule announced in **Garcia v. King** in the case at bar. If, as petitioner says, Waggoner's case and Garcia's case are in conflict, the latter would control, and the Circuit Court would have been compelled to follow it.

But the two cases are not in conflict. There were two wells on Sigler's lease **producing oil in paying quantities.** Waggoner did not complain that Sigler's lease was not producing in paying quantities. He complained that **Sigler had not drilled enough wells.** The State Supreme Court in Waggoner's case decided that Sigler's lease, **including his two commercially productive wells,** would not be canceled for his failure to drill more wells. The court said Sigler's obligation to drill more wells was an implied **covenant,** not a **limitation or condition** on his title, and that for the breach of this covenant he would be liable in damages, but his commercially productive lease would not be canceled. **That would be a forfeiture.**

In Garcia's case **there was no paying production.** Garcia did not complain of King's failure to drill more wells. Garcia complained that King was trying to hold on to a lease which had expired under its own **limitations and conditions** because **it had ceased to produce in paying quantities.** The State Supreme

Court held, in Garcia's case,[3] that the language of the **term clause** of the lease, viz.: that the lease should remain alive for a certain number of years, and thereafter so long as oil or gas was produced, **was a limitation or condition upon the title to the leasehold estate.** A life estate expires by its own limitation when the life tenant dies. **There is no forfeiture from his heirs.** The **legal** estate comes to an end by virtue of its own terms and limitations, and so it is, said the State Supreme Court in Garcia's case, and said the Circuit Court in the case at bar, with an oil and gas lease. The lessee's **legal title** is determinable. When paying production ceases the legal estate dies by virtue of the limitation imposed upon it in the term clause when the lease was created.

Both the Waggoner case and the Garcia case are sound, and both are the law in Texas. The facts of the case at bar are identical with the facts in Garcia's case, but wholly unrelated to those in Waggoner's case. The Circuit Court correctly applied the rule established in Garcia v. King.

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3. To the same effect are Watson v. Rochmill, (Tex. Sup. Ct.), 155 S. W. (2d) 783; Freeman v. Magnolia Petroleum Company, (Tex. Sup. Ct.), 171 S. W. (2d) 339; Kyle v. Wadley, 24 F. Sup. 884; Benedum-Trees Oil Company v. Davis, (C. C. A.), 107 F. (2d) 981; United States v. Brown, (D. C.) 15 F. (2d) 565; Continental Oil Company v. Osage Oil & Refining Company, (C. C. A.), 69 F. (2d) 19; Hutchinson v. McCue, 101 F. (2d) 111, cert. den., 60 S. Ct. 75; 308 U. S. 564; 84 L. Ed. 473; Live Oak Basin Oil Association v. Reagan, (Tex. Civ. App.), 289 S. W. 1052; No Writ; Stein v. Blackwell, (Tex. Civ. App.), 47 S. W. (2d) 490, No Writ; Duff v. DuBose, (Tex. Com. App.), 27 S. W. (2d) 122; Stanolind Oil & Gas Company v. Barnhill, (Tex. Civ. App.), 107 S. W. (2d) 746, writ ref'd.

2. **Reply to the Second Assignment of Error.** Petitioner's second assignment is based upon Judge Sibley's dissent in which he says:

> "There is no fact finding that the six gas wells operate at a loss, and the evidence does not show it." (R. 270).

The dissent, and the above quoted statement from it, arose from an oversight. The learned dissenting judge examined a part of the record, but not all of it. Specifically, he read the findings but not the judgment. Had he looked at the judgment, he would have found, in clear and explicit language, the identical finding which he says is missing. We quote from the trial court's judgment, (R. 184):

> "The oil, gas, and mineral lease which is the subject matter of this cause, * * * permanently ceased to produce **either oil or gas,** or both oil and gas, in paying and commercial quantities more than five years prior to this date * * *."

The record is replete with proof which completed this express finding by the trial court that this lease did not produce **gas** in paying quantities. For present purposes we cite only petitioner's verified admissions appearing at pages 22 to 38 of the reporter's typewritten "Exhibit Appendix" which admissions are authenticated and explained in the testimony appearing at pages 137 to 141 of the printed record. These accounts, prepared, sworn

to, and filed by petitioner's officers, show that during the years 1934, 1935, and 1936, petitioner **produced nothing but gas—no oil whatever.** During those three years in which it produced gas only, petitioner, by its own admissions, sustained losses in its current operations **from gas production only,** of $1010.83 in 1934, $1090.25 in 1935, and $413.32 in 1936.

Not only so, but the record shows that petitioner employed one field man only to attend to all its production. (R. pp. 50, 71, and 77). These same accounts, prepared by petitioner, show that the modest salary paid this one field employee, William Leslie, continuously exceeded petitioner's entire income from all its gas production. For example:

"Exhibit Appendix" Page	Year	Leslie's Salary	Total Gas Income
38	1943	$2070.00	$1222.92
36	1942	$1920.00	$ 432.78
34	1941	$1620.00	$1182.76

No notice is taken here of all petitioner's other current operating expenses, such as taxes, bookkeeping and office overhead, repairs, replacements, depreciation, automobile expense, telephone, telegraph, postage, attorney's fees, etc., etc., etc. The single item of the small salary paid its lone field man itself caused "the six gas wells (to) operate at a loss."

Respondent submits respectfully that both assignments are without merit and that the honorable Supreme Court is without jurisdiction.

A copy hereof has been mailed to Arthur H. Bartelt, attorney for petitioner, whose address is Post Office Box 190, Austin, Texas.

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KNOX MILLER,
Alamo National Building,
San Antonio 5, Texas,
Attorney for the Respondent.

.....

LEO BREWER,
Alamo National Building,
San Antonio 5, Texas,
Of Counsel for Respondent.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

No. 653

GAS RIDGE, INC.,
Petitioner

v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.,
Respondent

ANSWER TO MOTION TO DISMISS PETITION FOR CERTIORARI

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Austin, Texas
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Of Counsel, Austin, Texas

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ANSWER TO MOTION TO DISMISS PETITION FOR CERTIORARI

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, answering respondent's motion to dismiss, says:

The Honorable W. A. Keeling, judge of the District Court, upon a written stipulation entered into by and between the parties to this action by their

respective attorneys, Knox Miller for plaintiff, and Arthur H. Barnett for defendant, ordered that:

"The foregoing stipulation with references to sending up the original exhibits comprising the volume which the reporter has entitled 'Exhibit Appendix', and Exhibits A, B, and C referred to in the defendant's motion to re-open the case, is approved, and it is ordered that said volume entitled 'Exhibit Appendix, and said Exhibits A, B, C attached to defendant's motion to re-open the case, *shall not be copied* or *printed*, but the originals shall be transmitted with the record in the case to the appellate court. Filed Oct. 16 1944. W. A. Keeling, Presiding Judge." Tr. of Record 190 & 191.

Accordingly "Exhibit Appendix" and Exhibits A, B, and C referred to in defendant's motion to re-open the case were transmitted with the record in the case to the clerk of the Circuit Court of Appeals 5th Circuit.

In accordance with Rule 38, paragraph 7 of this court, the clerk of the Circuit Court of Appeals prepared the record which was to accompany this application for certiorari by preparing one original volume of the record and certified the same as being a true record in the case. Tr. R. p. 268.

This original record so certified to by the clerk, together with ten copies of each of the following: printed transcript of the record in the district court, petitioners Motion for Rehearing, Supplemental Mo-

tion for Rehearing and respondent's Reply to Motion for Rehearing were sent to Arthur H. Bartelt, attorney for appellant, at Austin, Texas. The latter in turn on the 5th day of December, 1945, together with petitioner's Motion for Certiorari and Supporting Brief, sent all of these records to the clerk of the Supreme Court of the United States by express except that three originals were sent to the clerk of the Supreme Court of the United States by airmail and special delivery.

On the 5th day of December, petitioner's attorney mailed to respondent's attorney, Knox Miller, Alamo National Bank Building, San Antonio, Texas, a copy of petitioner's petition for certiorari and supporting brief.

On December 12, 1945, petitioner's attorney wrote to Knox Miller, the attorney for respondent, "The Exhibit Appendix and other originals are not up. However, under Supreme Court Rule (10) 4, these can go up by you and me signing a stipulation to that effect and then have one of the Circuit Court judges sign an order requiring the clerk to ship them to the clerk of the Supreme Court. In a few days I will draw such stipulation and order and sign it and mail it to you."

Mr. Miller never answered this letter.

On December 19, 1945, petitioner's attorney received a copy of the letter of Knox Miller mailed to Charles Elmore Cropley, Clerk of this Court, as fol-

lows: "On behalf of the respondent in the above cause we are sending you under separate cover, by express, forty copies, one of which is signed, of the respondent's motion to dismiss the petition and its reply to the petition. *We herewith enclose a duplicate original*, filed copy of a seventy-seven page typewritten volume entitled by the court reporter, "Exhibit Appendix", which is comprised of the documentary evidence received at the trial, and the mission of which from the record as filed by the petitioner is the basis of the respondent's motion to dismiss the petition."

On Saturday, the 22nd of December, 1945, petitioner's attorney, while in San Antonio, went to the law office of respondent's attorney, Knox Miller, in the Alamo National Bank Building, San Antonio, to present to him a stipulation to be signed by respondent's and petitioner's attorney which read as follows:

> "It is hereby stipulated by and between the above named parties by their respective attorneys, subject to the approval of this Court, (the title of this stipulation being in the Circuit Court of Appeals where the records still are) that Exhibit Appendix containing plaintiff's exhibits 1 to 22 and defendant's exhibits A, B, and C (Tr. R. 170) attached to (referred to) in the motion to re-open the case, which were ordered by the Honorable W. A. Keeling, the Judge of the District Court, all of which are primarily production and expense figures 'not to be copied or printed, but the originals shall be transmitted with the record in the case to the

Appellate Court', (Tr. R. 190) be sent to the Supreme Court of the United States for its inspection in the matter of Gas Ridge, Inc's Petition for Certiorari now pending before the Supreme Court of the United States and that an order to that effect be issued by this Court directing that the clerk of this Court (Circuit Court) transmit all of the foregoing listed Exhibits to the clerk of the Supreme Court of the United States under such conditions as this Court shall state."

However, when petitioner's attorney arrived at the office of Attorney Miller, he found a note on the door stating that the office was closed until the next Monday, December 24, 1945. When petitioner's attorney returned to Austin, he mailed the stipulation which he had signed to Knox Miller. On Monday, December 24, petitioner's attorney telephoned Knox Miller by long distance and requested the latter to sign the stipulation. But Mr. Miller said he had not yet received the stipulation.

On Wednesday, December 26, petitioner's attorney again telephoned Knox Miller, when the latter said that he would not sign the stipulation which he had received that morning. In the same telephone conversation Knox Miller said he had received a copy of the record as prepared by the clerk of this Court and which petitioner's attorney had mailed to him on December 25, 1945.

Petitioner is willing to leave the carbon copy of "Exhibit Appendix" for the use of this Court in lieu

of the one now in the Circuit Court of Appeals, but subject to two conditions.

(a) Judge Sibley, in his dissenting opinion, says:

> "The motion for rehearing stresses the point that the lease continues so long as oil *or* gas is produced, the lease having been*misquoted* by *the trial court*, and *the difference having been overlooked by us.* I think the point is *well taken.*"

Knox Miller, in his pleadings, misquotes the term clause in the lease.

First Amended Complaint:

> (1) "for the term of five years from this date, and as long thereafter as oil *and* gas is produced from said leased premises by the lessee, its successors or assigns" (Tr. 5)
>
> (2) ". . . . said land has not produced oil *and* gas in paying or commercial quantities". (Tr. R. 8)
>
> (3) Again on page eight of the Transcript of Record and this time from the lease "five years from this date (December 7, 1920), and as long thereafter as oil and gas is produced from said leased premises."

Second Amended Complaint:

> (4) Quoting from lease ". . . . and as long thereafter as oil *and* gas is produced from said lease premises by lessee." (Tr. R. 19)

In Appellant's Supplemental Petition for Rehearing, page 8 and page 236 of the record, petitioner said:

> "The Court's attention is again called to the fact that the language of the lease is 'as long thereafter as oil *OR* gas is produced' and not 'as long as oil *AND* gas is produced.'
>
> * * * *
>
> Then throughout the Findings of Fact and Conclusions of Law, the findings of the Court (District) both as to fact and law speak of production in the aggregate, as does appellee throughout its brief, . . "

RESPONDENT MAKES NO ATTEMPT TO EXPLAIN ITS MISQUOTING OF THE TERM CLAUSE IN THE LEASE.

Although attorney Miller's attention has been called several times in petitioner's briefs as to his continually misquoting the term clause of the lease, whose plain, unambiguous language, which the courts are bound to follow, among other equally cogent issues, is a deciding point in this case all by itself, yet Attorney Miller has not at any time made any attempt to explain how it happened that the lease was misquoted.

Not even in the respondent's printed "Reply to Petition for Certiorari" just filed with this Court is

any explanation to be found. Was this just an oversight and if so, why has it happened several times and yet no explanation? Because of this silence of Respondent, petitioner says it is entitled to know if the copy of the lease sent to this Court, which is plaintiff's Exhibit "1" in "Exhibit Appendix, whether in its term clause, contains the word "or" or "and" between the two words "oil" and "gas". Petitioner is making inquiry from the clerk as to the exact wording contained in the copy of the lease as contained in Exhibit Appendix, Plaintiff's Exhibit 1.

(b) By stipulation of parties and Order of the District Judge, not only Exhibit Appendix was sent up to the Circuit Court of Appeals, but also defendant's Exhibits A, B, and C. These exhibits contained the production figures and costs of operation and computations thereon of all the leases in the field—all leases being operated on a one unit plan and also as to production figures and operating costs as to production on the Hamilton-Swain lease.

Respondent has sent to this Court a copy of Exhibit Appendix but not of defendant's Exhibit A, B, and C. Therefore, defendant is entitled to have its Exhibits A, B, and C transferred from the Circuit Court of Appeals to this Court for inspection.

Petitioner will file a motion in the Circuit Court of Appeals praying that it send both Exhibit Appendix and defendant's Exhibits A, B, and C to the Supreme Court of the United States. In support of said motion there will be filed a printed copy of this motion.

RESPONDENT'S MOTION TO DISMISS DOES NOT SET FORTH ANY JURISDICTIONAL ISSUE AND THEREFORE IT MUST BE DISMISSED.

> "No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant writs of certiorari may be included in briefs in opposition to petition therefor." (Rule 7 (3) of the Supreme Court of the United States.

Wherefore petitioner prays that respondent's motion to dismiss petitioner's petition for certiorari be denied.

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Of Counsel, Austin, Texas